THE

AMERICAN LAW REGISTER.

MAY, 1869.

THE JUDICIAL SYSTEM OF SCOTLAND.

As to judicial jurisdiction, Scotland and England, although politically under the same crown, and under the supreme sway of one united legislature, are to be considered as independent foreign countries, unconnected with each other. Cases of a judicial nature are to be treated as if they had occurred in the reign of Queen Elizabeth. A decree of the English Court of Chancery is not entitled to more respect in Scotland than a decree (interlocutor) of the Scottish Court of Session in England: 4 Macqueen R. 49, 50. English judges are not to be consulted on Scotch appeals: 3 Id. 691.

It should, however, be added that while the English Court of Chancery has regularly no jurisdiction over domiciled Scotchmen, this rule may be changed by Parliament, as it has been in the case of contributories under the act relating to joint stock companies: *Moyes* v. *Whinney*, 3 Session Cases (3d series) 183.

The general organization of the Scotch Courts at the present time is as follows: 1. Justices of the Peace. 2. Sheriffs and Sheriffs' Substitute. 3. The Court of Session. 4. The Bill Chamber. 5. The High Court of Justiciary. 6. The Court of Exchequer. 7. The Court of Teinds. 8. Local Courts. The fourth, fifth, sixth, and seventh courts are composed of members of the Court of Session.

I. *Justices of the Peace.*

These are appointed by commission under the Great Seal. Their number is not limited. No pecuniary or other property qualification is required. They continue in office until six months after the death of the sovereign who appoints them.

In criminal matters the precise limit of their powers is doubtful, except where they are specially conferred by statute. Any two or more of their number hold, in districts in their respective counties, a court of "petty sessions," in which the majority of criminal cases coming before justices is tried. The whole body of justices in the county hold the Quarter Sessions, hearing appeals from the petty sessions. Appeals lie in certain cases from the Quarter Sessions to the Court of Session, hereafter described. See *Avondale* v. *Whitelaw*, 3 Session Cases (3d series) 263.

The justices also have civil jurisdiction in "small debt" causes, conferred upon them by statute. The amount in question must not exceed 5*l*. They are required to hear the parties *viva voce*, and may examine them with or without oath, and may also swear witnesses. The pleadings must be oral. Any debt found due may be ordered to be paid by instalments. No appeal is allowed except upon the ground of malice or oppression, though a rehearing may in certain cases be had before the justices themselves. The jurisdiction thus conferred does not extend to cases of title to land.

II. *Court of the Sheriff or Sheriff's Substitute.*

The sheriff is the principal local judge of the county. He possesses both civil and criminal jurisdiction. In civil matters it extends to all actions upon contract and for damages, but not for heritable property. Admiralty jurisdiction is also conferred upon him within his sheriffdom, and even extends to foreigners there served with process: 5 Court of Session Cases (3d series) 497. Each sheriff has one or more substitutes by whom the principal part of the judicial business is performed. In fact, the judicial office of the sheriff is principally nominal. The substitutes are appointed by the sheriff, but are not removable except with the consent of the judges of the Court of Session. On this system cases are heard in the first instance by the sheriff substitute, whereupon the unsuccessful party may, by a simple proceeding, appeal

to the sheriff, and from him in proper cases to the Court of Session. The theory of judicial organization which permits a judge to appoint a deputy, is justly objected to by text writers, and is a remnant of an ancient usage which permitted all judges to delegate their authority: Glassford on Scotch Courts, p. 35.

By recent statutes, power has been conferred on the sheriff to exercise a summary jurisdiction in cases of "small debts" not exceeding 12*l.* The rules adopted in this class of cases are not materially different from those which prevail in Justices' Courts. No written pleadings are allowed without special leave of the court. Circuits to try these causes are held in different parts of the county, in some instances as often as once a month. Appeals lie to the Court of Justiciary (a criminal court to be hereafter described), only on grounds of corruption, malice, oppression, deviation from statutory forms indicating wilfulness, incompetency and defect of jurisdiction. This court must be a popular one, as the amount to which its jurisdiction applies has recently been extended from 8*l.* to 12*l.* Parties may by mutual consent provide that causes of a larger amount than 12*l.* may be heard in a summary way.

In other cases, the right of appeal is limited so that the sheriff's decision is final, unless the amount exceeds 25*l.*: 5 Court of Session Cases (3d series) 1003. Where the right of appeal exists there may be a stipulation that one appeal shall be final. Should an appeal in a civil case be improperly taken to the Court of Justiciary, it may be certified by that court to the Court of Session where it properly belongs: 24 Cases in the Court of Session (2d series) 437.

The sheriff has also criminal jurisdiction in all cases which do not infer death or banishment from Scotland. This extensive jurisdiction can, by recent statutes, only be exercised with a jury. He also acts as a ministerial officer in analogy to his duties under our own law.

The sheriff and his deputy or substitute, must be an advocate of three years' standing. The substitute must be certified by the Lord President of the Court of Session or the Lord Justice Clerk, to be duly qualified to hold the office.

The office of sheriff is held during good behavior, though there is a provision for a pension after long service. He may be removed for malfeasance in office by a proceeding on the part of

the Attorney-General or of four freeholders, before the Court of Session.

III. *Courts of which the Judges of the Court of Session are members.*

1. *Court of Session.*

All cases of a civil nature may be heard by the Court of Session, whether they be common law, equity, admiralty or probate,[1] with the exception of cases specially affected by Act of Parliament, and those involving a pecuniary amount not exceeding 25*l.*, which must be brought in an inferior court.

This court has a double function, being both a tribunal of original jurisdiction and a court of review. Its organization has varied much from time to time. It originally consisted of fifteen members. As a court of original jurisdiction it consisted of a single judge, whose duties were ascertained by a complicated system of rotation. As an appellate court, it was composed of the fifteen judges. This was an absurd arrangement, and the court was an object of ridicule, even by grave judicial functionaries. Lord Eldon gives the following anecdote from the bench: He said—"We shall get the House of Lords into the same difficulty as Sir James Boswell once placed me. I had the honor of arguing a case before the bar of the House of Lords with him, and, being senior in the profession, I stated with all humility the extreme pressure under which I labored, for I was to argue against the unanimous opinion of the fifteen judges. He came to the bar (with what degree of modesty is not for me to determine), but he blamed me to the House for prejudicing the cause of my client, stating that when the judges differed they thought very little about the matter, and when they agreed they thought nothing at all about it:" 4 Wilson and Shaw 211. Mr. Black, editor of the Morning Chronicle, said the court of fifteen was a regular bear garden, although some of the judges, more pacific than the others, slept on the bench during the argument, particularly Lord A., who had to be roused to give his vote. The Lord President in telling the division would ask, "My Lord A., how does your Lord-

[1] There are, however, "Commissary Courts" in each county in Scotland which grant formal probate. If a person dies domiciled abroad, the Commissary Court of Edinburgh has jurisdiction over assets in Scotland: 21 & 22 Vict. c. 56.

ship vote?" Lord A., fairly awake, would answer by a counter question, "How does my Lord Justice Clerk vote?" The President would reply, "My Lord Justice Clerk *adheres*," upon which Lord A. would at once tender his vote thus, "Then I adhere." His Lordship having thus discharged his duty would resume his nap, for he was extremely comatose: 2 Macqueen 685.[1]

The feebleness of the Court affected professional opinion so much as to suggest a change in its organization. In 1807, it was proposed to divide the Court of fifteen into three courts of five judges each, one of them to try causes with juries, and another with a Chancellor at its head, acting as an intermediate court of appeal between the Court of Session and the House of Lords. Public opinion was strongly divided in respect to this plan. David Hume headed the opposition, and Walter Scott is said to have shed tears over the abolition of the old court.

The plan ultimately adopted consisted in an organization of the court which will now be explained.

The number of the court was reduced to thirteen. For the purpose of original jurisdiction a single judge is selected, who is called "Lord Ordinary." Of these there are five who do not in general participate in the deliberations of the judges who form the appellate branch of the court. They are the five junior judges. At one time these Lords sat in the appellate court on a system of rotation, but as that course is no longer adopted, they are called "permanent Lords Ordinary." They are also designated as the "Outer House." The eight other judges, when collectively contrasted with "the Lords Ordinary," are known as the "Inner House." They are divided into two divisions of four each. The Chief Judge in the first division bears the title of Lord President, and the same officer in the second division is the Lord Justice Clerk.

Should an attempt be made to compare this system with theories with which we are familiar, it might be said that the Lords Ordinary answer in many respects to the Circuit Judge and Vice

[1] This "comatose" condition was not a new thing with Scotch judges. At the trial of Lord Argyle, in the reign of Charles II., for treason, "one of the judges was deaf and so old that he could not sit all the while the trial lasted, but went home and to bed. The other four were equally divided: so the old judge was sent for, and he turned it against Lord Argyle." Burnet's History of His Own Times, book 3.

Chancellor of the New York Constitution of 1821, while the first and second divisions of the Inner House correspond substantially to a double Supreme Court of that Constitution. This remark, however, is only true in general, for there are many essential points of difference between the two systems. Thus the Lords Ordinary, acting singly, may still hear appeals from decisions in the Sheriff's Court, though if a motion is made by either party, an appeal may be taken directly to the Court of Review without first being heard by the Lord Ordinary: 13 & 14 Vict. c. 36, § 32. So, on the other hand, there are occasions in which the judges of the "Outer House" are called in to act as members of the Court of Review, as when one of that body is necessarily absent or sick. There are also cases of great difficulty in which the opinion of the thirteen judges is taken. It is thus perceived that while at first sight there would appear to be three courts, yet for some purposes the old theory of a single tribunal still remains.

(1). *The permanent Lords Ordinary.*

The inference would readily be made from what has been said that causes must be heard before a single judge before they can be presented to a full bench of four judges. There are, however, cases of an extraordinary nature in which the "Inner House" has original jurisdiction. So the Lord Ordinary can refer a cause for advice to the division of the Inner House, to which he is for the time being attached. This is technically called "great avisandum." It is doubtful whether he can thus refer a question occurring in the course of a trial, though in a recent case the judges said they would be glad to give him informally the benefit of their advice: 24 Session Cases 300 (A. D. 1862).

The mode of determining before what Lord Ordinary any particular case shall be heard is singular. When a cause is brought into court, the party bringing the action, and in some few cases the respondent (13 & 14 Vict. c. 46, § 33), indicates before what judge he wishes the case to proceed, and to what division of the Court of Review he wishes to go in case of an appeal. The Lord Ordinary selected is deemed for the time being to be attached to the division in which the appeal is to be heard. This restriction has lately been added, that if the business accumulates too much in one tribunal, the president may redistribute it among the respective judges.

The discussion before the Lord Ordinary is often very elaborate and extensive. The regular course is to pronounce judgment at the close of the argument. He may, however, in general, reserve the cause for private consideration. This is not necessarily the case, for in some instances an order of court is necessary. This consideration is called "avisandum."

The judgment of the Lord Ordinary, unless appealed from, has the effect of a judgment of either division.

Trial by jury in civil cases did not exist until 1815. In that year great improvements were introduced into procedure through a royal commission. The leading changes, besides the introduction of juries, consisted in a system of pleadings, the use of oral instead of written arguments, and the earlier finality of judgments. Before that time, all testimony was taken on commission; records were unknown, and single judgments were not final. Says Cockburn: "The change was opposed by resolutions in every burgh and county in Scotland. The town councils and lairds were unanimously against it. The zeal of those opposed was extraordinary, but every commissioner was in favor of it, and it was adopted." P. 385.

There is now a separate roll of causes, called a "jury roll." There are but few causes tried by a jury, as a matter of course, and in general it is discretionary with the court whether there shall be a jury trial or not. This mode of trial is said by high authority still to be an "exotic" in Scotland, and issues are often so loosely framed as to call for animadversion in the House of Lords. The Lords Ordinary act as circuit judges, unless different arrangements are made by the Court of Session. An appeal lies to the proper division of the "Inner House," either on a bill of exceptions (and it must in that case be brought in with great promptness), or on the ground that the judgment is not sustained by the verdict. Jury issues may, by consent of the parties, be tried by the judge, without a jury. He must, in that case, find the facts specifically. He may review his findings upon his own minutes, when after argument, he may correct them or order a new trial. His findings of fact are final, unless they proceed on erroneous conclusions of law, such as the improper admission or rejection of evidence. Instead of a regular jury, the parties may select three, five or seven persons, who are sworn and sit as a jury. Exceptions may be taken to the rulings of the judge, but

no new trial can be had on the ground that the verdict is against evidence. This appears to be a combination of an arbitration and a trial.

(2). *The Inner House.*

Without further pursuing the proceedings of the Lords Ordinary, we now recur to the more detailed consideration of the organization of the Court of Session, acting as a court of appellate jurisdiction. Appeals are made in two ways—one by "reclaiming note," the other by "advocation"—the former being from the Lord Ordinary, and the latter from an inferior court. A very marked distinction is made between the presiding judge and the other judges. Thus, the Lord President receives a salary of 4800*l.*, the Lord Justice Clerk of 4500*l.*, and each of the other judges 3000*l.* There are also indications in the cases that the opinions of the presiding judges have somewhat greater authority than the others, or, in the language of an old English judge, "that opinions are weighed rather than counted."

The mode adopted for disposing of causes is somewhat peculiar. There is a difference between the discussion of a cause and "hearing" it. The word "hearing" has a technical meaning and implies an elaborate oral argument, while in many discussions on appeal, a case which may have been elaborately discussed before the Lord Ordinary, is disposed of in a few minutes. This peculiarity grows out of an old practice, the effects of which are not entirely removed.

Whenever a vacancy occurs in either division, any judge of the other division may at his request be appointed to fill the vacancy. The vacancy occasioned by his transfer is filled by the appointment of the senior "permanent Lord Ordinary." If no transfer is made, the original vacancy is supplied by the appointment of the senior permanent Lords Ordinary. In this manner the Appellate Court is continually recruited by appointment from the judges of original jurisdiction.

It is manifest that there are two objections to an Appellate Court so organized. One is that as it consists of four, there may be an equality of voices, and consequently no judgment; the other is, that as there are two co-ordinate courts, there may be opposing decisions, and no valid precedent established. The modes devised

for meeting or palliating the difficulties thus occasioned will now be detailed.

In the first case, of an equality of voices, the case is reserved for further discussion. The permanent Lord Ordinary who heard the cause may be called in to attend the rehearing, and, the court thus consisting of five judges, a majority may be obtained.

It is also provided by statute, that when either division is equally divided, they may call in three judges of the other house, when a majority shall decide the cause, though it is deemed to be the judgment of the division before which the case is pending: 13 & 14 Vict. c. 36, § 35.

In respect to the second case, it is plain that the organization of a double Appellate Court is open to the objection of causing uncertainty in the law. Says Glassford: "Although the two courts are denominated, First and Second Chambers of Session, and are still understood and declared to form a sole and aggregate body for certain special purposes, yet in regard to all the important and significant ends of such establishments, they are by their constitution co-ordinate and supreme courts having independent authority. But where two courts holding jurisdiction of the same pleas have also an equal supremacy, it is plain that the law may be differently interpreted by them, and certain that at some period the discrepancy will take place." Pp. 66, 67.

It is provided by statute that it shall be competent to the judges of either division, in cases which shall appear to be of importance and difficulty, to state questions of law arising in such cases, and to require the opinions of the judges of the rest of the court, which shall be given by them in a collective capacity, or individually. See *Sharpe* v. *McLeod*, 23 Session Cases (2d series) 1015. This method, however, is imperfect, as its adoption is discretionary with the court, and no mode is provided by which the suitor can require a general consultation.

(3). *The Appellate Jurisdiction of the House of Lords.*

An appeal lies from the judgment of either division to the House of Lords, and in this manner a certain amount of uniformity of decision is maintained. This appeal is expensive, and only advisable in important cases. It involves frequently great delay and circuity of procedure. The House of Lords may think it wise to have a reconsideration of the case in Scotland, when it

may be remitted to the thirteen judges. This is called a "hearing in presence."

Perhaps the working of the system in this respect will be best shown by the statement of an actual case from the reports. A case was heard before a Lord Ordinary. It was thence appealed to the first division of the Court of Session—it was thence carried to the House of Lords. It was remitted by that body to the thirteen judges to be "heard in presence." The whole record was ordered to be opened, so as to enable parties to amend their pleadings. On the new hearing the thirteen judges delivered their opinions *seriatim*. A doubt then arose whether the former appeal was not destroyed by the opening of the record, and after all this discussion the whole case is treated by the reporter as undisposed of: 1 Macqueen R. 15, 35.

The House of Lords, besides requiring a "hearing in presence," may order the judges of the court not belonging to the division from which the appeal is taken, to be consulted. They are then called "consulted judges."

It should be remarked that the same process may be resorted to when the cause originated before the Sheriff's Court, and came into the Court of Session by appeal. A single illustration will suffice. A cause was heard before the sheriff's substitute; it then came before the sheriff on appeal; it was then carried to the Court of Session, where it was heard by the Ordinary; it was thence appealed to the first division (four judges), who, after a hearing, required an argument before the eight appeal judges, and then required an opinion in writing from the thirteen judges; an appeal was thence taken to the House of Lords: 1 Macqueen, bet. 121 and 160.

There is undoubtedly one great advantage in this thoroughness of discussion. It is likely to settle principles, though at enormous expense to the suitor. English courts quite frequently avail themselves of Scotch opinions in cases of general law: 1 Macqueen 160. Suitors are sometimes inflamed with a desire to produce a valid precedent. Thus, in one case, the subject-matter of the action was worth 2*l.* per year. There had been four actions in the Court of Session, and an appeal to the House of Lords. On a second appeal to that body, Lord Brougham asked, "What advantage will be gained by succeeding?" It was answered, "The satisfaction of settling the law:" 1 Macqueen 191.

Appeals to the House of Lords can, in general, only be taken from final judgments, although there may be an appeal from an interlocutory judgment with leave of the judges of the Session, or when there is a difference of opinion among them: 4 Macqueen 352.

There has been great difference of opinion as to the propriety of permitting English judges in the "House of Lords" to sit as a court of revision over the decisions of Scotch judges. It is well known that the Scotch system of jurisprudence is radically different from the English, being based on the Roman or civil law, instead of the common law.

Some of the ablest Scottish jurists, however, approve of it as infusing a liberal element into their law. Scotland, they say, is "too narrow," and the benefits of the wider views taken by English lawyers, owing to their broad field of investigation, are often conspicuous. These remarks have been applied to the judgment of Lord Brougham in the famous Warrender Case, of which it has been said, that it verifies the remark of Mr. Hume, that in matters of reasoning, the arguments, when just, can never be too refined: 2 Macqueen 664. It has been thought wise to have at least one of the ablest of the Scotch jurists in the House of Lords, to be consulted in delicate cases, and who, being removed from that country, may be supposed to have left behind him any prepossessions derived from an exclusive attention to Scotch jurisprudence.

Lord Colonsay became on this account a member of the House of Lords.

2. *Bill Chamber.*

The duties of this court are to make orders of arrest, attachment, and of preferential judgments or "diligence," so called, &c., &c. One of the Lords Ordinary attends to this business in term time, while during vacation the six lords who do not sit in the Court of Justiciary officiate for a fixed number of days in rotation.

3. *The High Court of Justiciary.*

This court is composed of the Lord President of the Session, who is then called Lord Justice General, the Lord Justice Clerk, and five other judges of the session, specially commissioned by the King. The Lord President is rarely in attendance, so that the inconvenience of having two chief judges on the bench seldom

happens. A quorum consists of three judges. It has jurisdiction of all criminal cases, except high treason, which is tried by a special commission of Oyer and Terminer, in the English manner, with a grand jury. Three justiciary judges are in that commission. This court holds sessions in banc and circuits twice a year, at various points in the kingdom. The English House of Lords has awarded these tribunals very high praise. It has said that trials by jury in Scotland, in criminal cases, have been admirably conducted, and there is no country in the world where criminal law is more admirably administered: *Ritchie* v. *Ritchie*, 4 Macqueen 165. The Justiciary Court (circuit) also hears appeals in summary cases from the sheriff, &c. There is understood to be no appeal from this court to the House of Lords.

4. *Court of Exchequer.*

This is composed of two of the Lords of Session who are not members of the High Court of Justiciary. They hold office for a year at a time. The jurisdiction of this tribunal has been much reduced in modern times, and chiefly consists of issuing writs of execution (extent) and conducting other judicial matters connected with the revenue. Should a revenue case be pending before a sheriff, the Lord Ordinary in the Exchequer may stay the proceeding by interdict, so as to have the matter heard before a competent tribunal, and no appeal is necessary: 23 Session Cases (2d series) 1015. The Scotch Exchequer statutes do not deprive the Court of Session of its original jurisdiction: 4 Macqueen 89.

5. *Court of Teinds, (or Tithes).*

This is also composed of members of the Court of Session. Its jurisdiction consists of cases arising under the laws relating to church tithes.

The judges of the Court of Session and of the courts thus formed out of it are appointed by the Crown, and are at present men of great learning and skill in their profession. They hold office during good behavior, although they may retire at the end of fifteen years, receiving an annuity equal to three-fourths of the salary: Glassford 3.

Certain forms are prescribed by law for ascertaining their quali-

fications to act as judges, for which consult Bell's Scotch Law Dictionary.

In closing this review of the higher Scotch courts, one cannot but be struck with the immense and multifarious business transacted by the judges of the Court of Session. In their proper character as a court they have to do with all the legal matters of the country, whether legal or equitable, maritime or ecclesiastical. The Inner House is in session from November 12th to March 11th, and from May 20th to July 20th. The Ordinaries, from November 1st to March 20th, and from May 20th to July 20th. More than half of the entire year is thus occupied. In the vacation the various judges are acting in the High Court of Justiciary, or holding its circuits; or in the Bill Chamber, the Court of Exchequer, or the Court of Teinds. How can so much work be accomplished? In the year 1839, thirteen judgeships were abolished, saving the government over fifty thousand pounds, and the duties of these officers were imposed on the judges of the Court of Session. As an offset to this increase of duty, their salaries were largely augmented. British statesmen have perceived that the true course is to fully occupy the time of the judges, pay them large and honorable salaries, make their tenure permanent, and pay them, if after a lengthened and honorable service they desire to retire, a competent annuity. Call it not a pension, but an honorarium—a tribute from a grateful State for honorable and most valuable service. On such terms, it is the highest honor in the State to fill the post of judge, and the ablest lawyers may faithfully, contentedly, and earnestly devote to it the energy of their lives.

IV. *Inferior Local Courts.*

There is a "Merk" Court held in the city of Edinburgh to hear small causes, and also claims for servants' wages to any amount.

There are also Bailie and Sequestration Courts held in that city every Friday.

There is a Dean of Guild Court for settling disputes between merchant and merchant, and merchant and mariner.

Recent statutes provide that certain disputes between manufacturers and their workmen shall be settled in a summary manner before inferior magistrates, to which, if the parties do not consent, a compulsory arbitration is required: Forsyth's Dictionary.

The "Burgh" Courts, which were formerly of considerable importance, are now insignificant, their jurisdiction mainly consisting in the cognisance of trifling criminal causes.

T. W. D.

RECENT AMERICAN DECISIONS.

Superior Court of Cincinnati.

BAILEY *v.* BERRY ET AL.

Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.

A release to one of several joint trespassers will discharge all; but it must be a technical release, not merely a covenant not to sue, or other instrument amounting to a release by implication merely.

Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed, *held*, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict to deduct the amount received already by plaintiff from the amount of damages sustained by him.

THIS was a case reserved from Special Term upon the pleadings and the evidence contained in the bill of exceptions.

In February 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants, B. Taylor, Hallam, Piner, Root, and Winston, filed demurrers to the petition, which, after argument, were overruled.

On the 16th of June 1862, Charles Air answered with a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this, Berry, Winston, Root, and Air filed answers,